

1 Chad M. Hagan (*pro hac vice*)
2 chagan@twlaw.com

3 Timothy M. Frank (*pro hac vice*)
4 tfrank@twlaw.com

E-FILED 9/10/08

5 **T. WADE WELCH & ASSOCIATES**

6 2401 Fountainview, Suite 700

7 Houston, Texas 77057

8 Telephone: (713) 952-4334

9 Facsimile: (713) 952-4994

10 Attorneys for Plaintiffs/Counter-defendants

11 Andrew P. Bridges (SBN: 122761)

12 abridges@winston.com

13 Jennifer A. Golinveaux (SBN: 203056)

14 jgolinveaux@winston.com

15 **WINSTON & STRAWN LLP**

16 101 California Street

17 San Francisco, California 94111-5894

18 Telephone: (415) 591-1000

19 Facsimile: (415) 591-1400

20 Attorneys for Defendant/Counterclaimant

21 Freetech, Inc.

22 **UNITED STATES DISTRICT COURT**
23 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
24 **SAN JOSE DIVISION**

25 ECHOSTAR SATELLITE L.L.C. et al.,

26 Plaintiffs,

27 v.

28 FREETECH, INC. and DOES 1-10,

Defendants.

FREETECH, INC.,

Counterclaimant,

v.

ECHOSTAR SATELLITE L.L.C. et al.,

Counter-defendants.

Case No. CV-07-6124 (JW)

STIPULATED PROTECTIVE ORDER

1 1. PURPOSES AND LIMITATIONS

2 Disclosure and discovery activity in this action are likely to involve production of
 3 confidential, proprietary, or private information for which special protection from public
 4 disclosure and from use for any purpose other than prosecuting this litigation would be warranted.
 5 The parties also wish to protect themselves from inadvertent disclosure of privileged materials.
 6 Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated
 7 Protective Order. The parties acknowledge that this Order does not confer blanket protections on
 8 all disclosures or responses to discovery and that the protection it affords extends only to the
 9 limited information or items that are entitled under the applicable legal principles to treatment as
 10 confidential. The parties further acknowledge, as set forth in Section 10, below, that this
 11 Stipulated Protective Order creates no entitlement to file confidential information under seal;
 12 Civil Local Rule 79-5 sets forth the procedures that must be followed and reflects the standards
 13 that will be applied when a party seeks permission from the court to file material under seal.

14 2. DEFINITIONS

15 2.1 Party: any party to this action, including all of its officers, directors,
 16 employees, consultants, retained experts, and outside counsel (and their support staff).

17 2.2 Disclosure or Discovery Material: all items or information, regardless of the
 18 medium or manner generated, stored, or maintained (including, among other things, testimony,
 19 transcripts, or tangible things) that are produced or generated in disclosures or responses to
 20 discovery in this matter.

21 2.3 “Confidential” Information or Items: information (regardless of how
 22 generated, stored or maintained) or tangible things that qualify for protection under standards
 23 developed under F.R.Civ.P. 26(c).

24 2.4 “Highly Confidential – Attorneys’ Eyes Only” Information or Items:
 25 extremely sensitive “Confidential Information or Items” whose disclosure to another Party or
 26 non-party would create a substantial risk of serious injury that could not be avoided by less
 27 restrictive means.

28 2.5 Receiving Party: a Party that receives Disclosure or Discovery Material from

1 a Producing Party.

2 2.6 Producing Party: a Party or non-party that produces Disclosure or Discovery
3 Material in this action.

4 2.7 Designating Party: a Party or non-party that designates information or items
5 that it produces in disclosures or in responses to discovery as “Confidential” or “Highly
6 Confidential – Attorneys’ Eyes Only.”

7 2.8 Protected Material: any Disclosure or Discovery Material that is designated as
8 “Confidential” or as “Highly Confidential – Attorneys’ Eyes Only.”

9 2.9 Outside Counsel: attorneys who are not employees of a Party but who are
10 counsel of record to a Party in this action.

11 2.10 House Counsel: attorneys who are employees of a Party.

12 2.11 Counsel (without qualifier): Outside Counsel or House Counsel (as well as
13 their support staffs).

14 2.12 Expert: a person with specialized knowledge or experience in a matter
15 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert
16 witness or as a consultant in this action and who is not a past or a current employee of a Party or
17 of a competitor of a Party’s and who, at the time of retention, is not anticipated to become an
18 employee of a Party or a competitor of a Party’s. This definition includes a professional jury or
19 trial consultant retained in connection with this litigation.

20 2.13 Professional Vendors: persons or entities that provide litigation support
21 services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations;
22 organizing, storing, retrieving data in any form or medium; etc.) and their employees and
23 subcontractors.

24 3. SCOPE

25 The protections conferred by this Stipulation and Order cover not only Protected Material
26 (as defined above), but also any information copied or extracted therefrom, as well as all copies,
27 excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by
28 parties or counsel to or in court or in other settings that might reveal Protected Material.

1 4. DURATION

2 Even after the termination of this litigation, the confidentiality obligations imposed by this
3 Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order
4 otherwise directs.

5 5. DESIGNATING PROTECTED MATERIAL

6 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each
7 Party or non-party that designates information or items for protection under this Order must take
8 care to limit any such designation to specific material that qualifies under the appropriate
9 standards. A Designating Party must take care to designate for protection only those parts of
10 material, documents, items, or oral or written communications that qualify – so that other portions
11 of the material, documents, items, or communications for which protection is not warranted are
12 not swept unjustifiably within the ambit of this Order.

13 Mass, indiscriminate, or routinized designations are prohibited. Designations that
14 are shown to be clearly unjustified, or that have been made for an improper purpose (e.g., to
15 unnecessarily encumber or retard the case development process, or to impose unnecessary
16 expenses and burdens on other parties), expose the Designating Party to sanctions.

17 If it comes to a Party's or a non-party's attention that information or items that it
18 designated for protection do not qualify for protection at all, or do not qualify for the level of
19 protection initially asserted, that Party or non-party must promptly notify all other parties that it is
20 withdrawing the mistaken designation.

21 5.2 Manner and Timing of Designations. Except as otherwise provided in this
22 Order (see, e.g., second paragraph of section 5.2(a), below), or as otherwise stipulated or ordered,
23 material that qualifies for protection under this Order must be clearly so designated before the
24 material is disclosed or produced.

25 Designation in conformity with this Order requires:

26 (a) for information in documentary form (apart from transcripts of
27 depositions or other pretrial or trial proceedings), that the Producing Party affix the legend
28 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" at the top

1 or bottom of each page that contains protected material. If only a portion or portions of the
2 material on a page qualifies for protection, the Producing Party also must clearly identify the
3 protected portion(s) (e.g., by making appropriate markings in the margins) and must specify, for
4 each portion, the level of protection being asserted (either “CONFIDENTIAL” or “HIGHLY
5 CONFIDENTIAL – ATTORNEYS’ EYES ONLY”).

6 A Party or non-party that makes original documents or materials available
7 for inspection need not designate them for protection until after the inspecting Party has indicated
8 which material it would like copied and produced. During the inspection and before the
9 designation, all of the material made available for inspection shall be deemed “HIGHLY
10 CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the
11 documents it wants copied and produced, the Producing Party must determine which documents,
12 or portions thereof, qualify for protection under this Order, then, before producing the specified
13 documents, the Producing Party must affix the appropriate legend (“CONFIDENTIAL” or
14 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”) at the top or bottom of each page
15 that contains Protected Material. If only a portion or portions of the material on a page qualifies
16 for protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by
17 making appropriate markings in the margins) and must specify, for each portion, the level of
18 protection being asserted (either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
19 ATTORNEYS’ EYES ONLY”).

20 (b) for testimony given in deposition or in other pretrial or trial
21 proceedings, that the Party or non-party offering or sponsoring the testimony identify on the
22 record, before the close of the deposition, hearing, or other proceeding, all protected testimony,
23 and further specify any portions of the testimony that qualify as “CONFIDENTIAL” or
24 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” When it is impractical to
25 identify separately each portion of testimony that is entitled to protection, and when it appears
26 that substantial portions of the testimony may qualify for protection, the Party or non-party that
27 sponsors, offers, or gives the testimony may invoke on the record (before the deposition or
28 proceeding is concluded) a right to have up to 20 days to identify the specific portions of the

1 testimony as to which protection is sought and to specify the level of protection being asserted
 2 (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”). Only
 3 those portions of the testimony that are appropriately designated for protection within the 20 days
 4 shall be covered by the provisions of this Stipulated Protective Order.

5 Transcript pages containing Protected Material must be separately bound
 6 by the court reporter, who must affix to the top or bottom of each such page the legend
 7 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” as
 8 instructed by the Party or non-party offering or sponsoring the witness or presenting the
 9 testimony.

10 (c) for information produced in some form other than documentary, and for
 11 any other tangible items, that the Producing Party affix in a prominent place on the exterior of the
 12 container or containers in which the information or item is stored the legend “CONFIDENTIAL”
 13 or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” If only portions of the
 14 information or item warrant protection, the Producing Party, to the extent practicable, shall
 15 identify the protected portions, specifying whether they qualify as “Confidential” or “Highly
 16 Confidential – Attorneys’ Eyes Only.”

17 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure
 18 to designate qualified information or items as “Confidential” or “Highly Confidential –
 19 Attorneys’ Eyes Only” does not, standing alone, waive the Designating Party’s right to secure
 20 protection under this Order for such material. If material is appropriately designated after the
 21 material was initially produced, the Receiving Party, on timely notification of the designation,
 22 must make reasonable efforts to assure that the material is treated in accordance with the
 23 provisions of this Order.

24 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

25 6.1 Timing of Challenges. Unless a prompt challenge to a Designating Party’s
 26 confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary
 27 economic burdens, or a later significant disruption or delay of the litigation, a Party does not
 28

1 waive its right to challenge a confidentiality designation by electing not to mount a challenge
2 promptly after the original designation is disclosed.

3 6.2 Meet and Confer. A Party that elects to initiate a challenge to a Designating
4 Party's confidentiality designation must do so in good faith and must begin the process by
5 conferring directly (through written correspondence, followed by a telephone conference or in-
6 person discussion) with counsel for the Designating Party. In conferring, the challenging Party
7 must explain the basis for its belief that the confidentiality designation was not proper and must
8 give the Designating Party a reasonable opportunity to review the designated material, to
9 reconsider the circumstances, and, if no change in designation is offered, to explain the basis for
10 the chosen designation. A challenging Party may proceed to the next stage of the challenge
11 process only if it has engaged in this meet and confer process first.

12 6.3 Judicial Intervention. A Party that elects to press a challenge to a
13 confidentiality designation after considering the justification offered by the Designating Party
14 may file and serve a motion under Civil Local Rule 7 (and in compliance with Civil Local Rule
15 79-5, if applicable) that identifies the challenged material and sets forth in detail the basis for the
16 challenge. Each such motion must be accompanied by a competent declaration that affirms that
17 the movant has complied with the meet and confer requirements imposed in the preceding
18 paragraph and that sets forth with specificity the justification for the confidentiality designation
19 that was given by the Designating Party in the meet and confer dialogue.

20 The burden of persuasion in any such challenge proceeding shall be on the
21 Designating Party. Until the court rules on the challenge, all parties shall continue to afford the
22 material in question the level of protection to which it is entitled under the Producing Party's
23 designation.

24 7. ACCESS TO AND USE OF PROTECTED MATERIAL

25 7.1 Basic Principles. A Receiving Party may use Protected Material that is
26 disclosed or produced by another Party or by a non-party in connection with this case only for
27 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be
28 disclosed only to the categories of persons and under the conditions described in this Order.

1 When the litigation has been terminated, a Receiving Party must comply with the provisions of
2 section 11, below (FINAL DISPOSITION).

3 Protected Material must be stored and maintained by a Receiving Party at a
4 location and in a secure manner that ensures that access is limited to the persons authorized under
5 this Order.

6 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
7 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may
8 disclose any information or item designated CONFIDENTIAL only to:

9 (a) the Receiving Party's Outside Counsel of record in this action, as well
10 as employees of said Counsel to whom it is reasonably necessary to disclose the information for
11 this litigation and who have signed the "Agreement to Be Bound by Protective Order" that is
12 attached hereto as Exhibit A;

13 (b) the officers, directors, and employees (including House Counsel) of the
14 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have
15 signed the "Agreement to Be Bound by Protective Order" (Exhibit A);

16 (c) experts (as defined in this Order) of the Receiving Party to whom
17 disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be
18 Bound by Protective Order" (Exhibit A);

19 (d) the Court and its personnel;

20 (e) court reporters, their staffs, and professional vendors to whom
21 disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be
22 Bound by Protective Order" (Exhibit A);

23 (f) during their depositions, witnesses in the action to whom disclosure is
24 reasonably necessary and who have signed the "Agreement to Be Bound by Protective Order"
25 (Exhibit A). Pages of transcribed deposition testimony or exhibits to depositions that reveal
26 Protected Material must be separately bound by the court reporter and may not be disclosed to
27 anyone except as permitted under this Stipulated Protective Order; and
28

(g) the authors of the document, senders, addressees, and designated copy recipients of the document.

7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or Items. Unless otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” only to:

(a) the Receiving Party’s Outside Counsel of record in this action, as well as employees of said Counsel to whom it is reasonably necessary to disclose the information for this litigation and who have signed the “Agreement to Be Bound by Protective Order” that is attached hereto as Exhibit A;

(b) House Counsel of a Receiving Party who has no involvement in competitive decision-making involving the Receiving Party’s satellite receiver or satellite programming business, to whom disclosure is reasonably necessary for this litigation, and who has signed the “Agreement to Be Bound by Protective Order” (Exhibit A);

(c) Experts (as defined in this Order) to whom disclosure is reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by Protective Order” (Exhibit A);

(d) the Court and its personnel;

(e) court reporters, their staffs, and professional vendors to whom disclosure is reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by Protective Order” (Exhibit A); and

(f) the authors of the document, senders, addressees, and designated copy recipients of the document.

8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a Receiving Party is served with a subpoena or an order issued in other litigation that would compel disclosure of any information or items designated in this action as

1 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”, the
2 Receiving Party must so notify the Designating Party, in writing (by fax, if possible) immediately
3 and in no event more than three court days after receiving the subpoena or order. Such
4 notification must include a copy of the subpoena or court order.

5 The Receiving Party also must immediately inform in writing the Party who
6 caused the subpoena or order to issue in the other litigation that some or all the material covered
7 by the subpoena or order is the subject of this Protective Order. In addition, the Receiving Party
8 must deliver a copy of this Stipulated Protective Order promptly to the Party in the other action
9 that caused the subpoena or order to issue.

10 The purpose of imposing these duties is to alert the interested parties to the
11 existence of this Protective Order and to afford the Designating Party in this case an opportunity
12 to try to protect its confidentiality interests in the court from which the subpoena or order issued.
13 The Designating Party shall bear the burdens and the expenses of seeking protection in that court
14 of its confidential material – and nothing in these provisions should be construed as authorizing or
15 encouraging a Receiving Party in this action to disobey a lawful directive from another court.

16 **9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

17 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected
18 Material to any person or in any circumstance not authorized under this Stipulated Protective
19 Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the
20 unauthorized disclosures, (b) use its best efforts to retrieve all copies of the Protected Material, (c)
21 inform the person or persons to whom unauthorized disclosures were made of all the terms of this
22 Order, and (d) request such persons or persons to execute the “Acknowledgment and Agreement
23 to Be Bound” that is attached hereto as Exhibit A.

24 **10. FILING PROTECTED MATERIAL**

25 Without written permission from the Designating Party or a court order secured after
26 appropriate notice to all interested persons, a Party may not file in the public record in this action
27 any Protected Material. A Party that seeks to file under seal any Protected Material must comply
28 with Civil Local Rule 79-5.

11. FINAL DISPOSITION

Unless otherwise ordered or agreed in writing by the Producing Party, within sixty days after the final termination of this action, each Receiving Party must return all Protected Material to the Producing Party. As used in this subdivision, "all Protected Material" includes all copies, abstracts, compilations, summaries or any other form of reproducing or capturing any of the Protected Material. With permission in writing from the Designating Party, the Receiving Party may destroy some or all of the Protected Material instead of returning it. Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) by the sixty day deadline that identifies (by category, where appropriate) all the Protected Material that was returned or destroyed and that affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries or other forms of reproducing or capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney work product, even if such materials contain Protected Material. Any such archival copies that contain or constitute Protected Material remain subject to this Protective Order as set forth in Section 4 (DURATION), above.

12. MISCELLANEOUS

12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the Court in the future.

12.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

13. INADVERTENT DISCLOSURE OF PRIVILEGED MATERIALS

Notwithstanding any other provision of this Stipulated Protective Order, each Party agrees that there shall be no waiver as to inadvertently-produced discovery materials that are protected

1 from discovery on the basis of privilege or the work-product doctrine under Rule 26 of the
 2 Federal Rules of Civil Procedure. The inadvertent production of such materials does not waive
 3 any privilege or immunity with respect to such production or with respect to other materials or
 4 information referred to in the materials produced, so long as a request for the return of such
 5 documents or information is made within ten (10) Court days after the producing party learns of
 6 the inadvertent production. Within five (5) Court days of such request, the receiving party shall
 7 take reasonable efforts to return the inadvertently produced documents identified and all copies
 8 thereof, and certify in writing that it has done so. Nothing in this paragraph shall prejudice the
 9 right of any party to seek discovery of communications, documents and things as to which a claim
 10 of privilege has been made.

11
 12 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

13 DATED: 9/10/08 /s/
 14 Chad M. Hagan
 15 Timothy M. Frank
 16 Attorneys for Plaintiffs/Counter-defendants

17 DATED: 9/9/08 /s/
 18 Andrew P. Bridges
 19 Jennifer A. Golinveaux
 20 Matthew A. Scherb
 21 Attorneys for Defendant/Counterclaimant

22 PURSUANT TO STIPULATION, IT IS SO ORDERED.

23 DATED: 9/10/08 
 24 Honorable ~~James Ware~~ Richard Seeborg
 25 United States ~~District Judge~~ Magistrate Judge

EXHIBIT AACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____
 [print or type full address], declare under penalty of perjury that I have read in its entirety and
 understand the Stipulated Protective Order that was issued by the United States District Court for
 the Northern District of California on _____ in the case of *EchoStar Satellite L.L.C. et al.*
v. Freetech, Inc. et al., Case No. CV-07-6124 (JW). I agree to comply with and to be bound by
 all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to
 so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly
 promise that I will not disclose in any manner any information or item that is subject to this
 Stipulated Protective Order to any person or entity except in strict compliance with the provisions
 of this Order. If House Counsel of a Receiving Party, I attest that I have no involvement in
 competitive decision-making involving the Receiving Party's satellite receiver or satellite
 programming business.

I further agree to submit to the jurisdiction of the United States District Court for the
 Northern District of California for the purpose of enforcing the terms of this Stipulated Protective
 Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of
 _____ [print or type full address and telephone number]
 as my California agent for service of process in connection with this action or any proceedings
 related to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____
 [printed name]

Signature: _____
 [signature]